United States District Court
District of Massachusetts

Civil # 04-12125-RWZ
CR 00-10334-RWZ

Response To U.S. Attorney's Petition

Petitioner's Opposition To United States Attorney And Assistant United States Attorney's Petition Filed Under 28 U.S.C. § 2255 For Order Amending Judgment In a Criminal Case

Now comes the Petitioner's response to refusals of United States Attorney, Michael J. Sullivan and Cynthia W. Lie in Assistant U.S. Attorney, appose to petitioners petition filed by Anthony Ivery (IVERY) to ANTHONY IVERY under 28 U.S.C. § 2255 for an order Amending Judgment In a Criminal Case.

Petitioner (IVERY) seeks to vacate his conviction and or be resentenced due to the United States Sentencing Guidelines (U.S.S.G) retroactive change in Oxycodone sentencing pursuant to U.S.S.G. Amendment 657 in November 2003, also under grounds that was also Amended involving the weight of drugs in the amount of 4.1 grams of cocaine base that would not be in the legal Jurisdiction of the court to pursue, pursuant to U.S.S.G § 2D1.1 (c) (8) that states that the Petitioner can only be charged with U.S.S.G § 2D1.1 (c)(8) when the offense involves at least four grams, but less than five grams of Cocaine base. The base level offense is 24. Due to the contents within the drugs 4.1 grams would be the court in Error to charge the petitioner under USSG § 2D1.1 (c) (8) because the entirety of the 4.1 grams was not cocaine base which would have knocked the 4.1 to much less than the intended amount.

Also, I state under perjury that U.S. and Asst U.S. Attorney knew that they was in Error and refused to change [illegible] Check Computer-Aided

Transcription Courtroom 12, Federal Courthouse, Boston, Massachusetts, May 10, 2001, # CR 00-10334-RWZ. (Page 9:18) (Government) Now it is my understanding at the moment that, that given the quantity that (which is not all base-cocaine because it was not removed of the excess of Gross and net weight) of cocaine involved in this, there would be an offense level of 24 for the offence itself. Page 16:24 states that the Goverment Cynthia W. Lie and Michael J. Sullivan admitted saying; That crack cocaine was analyzed by the DEA Laboratory and it was 1.5 grams of cocain base also known as crack, alone with the second transaction that was said to be 2.6 grams of crack cocaine, never being sent to Mid Atlantic Lab for testing. (Also page 18:1-2)

Also the Goverament was in Error to accept my plea that I was not not charged with of Aider and Abettor. I dont plea guilty as it will show on page 18: 8-25. I was charged with Violation of 21 U.S.C § 841 (a)(1) and I did not plea guilty but was sentenced by the court which was a very clear Error.

(Page 19 to 22) 19:18 States, Goverment, I find that the defendant understands the nature of the charges, that the plea is voluntarily and there is a factual basis for it, and will therefore accept it to the two count indictment.

US Attorney's did understand its unlawful error from 19:25 where it states, (US Attorneys) I'm a little bit concerned about the (Page 20:1-) defendant's acceptance of responsibility in this case, only in that certainly what he said would fulfill the elements of aiding and abetting the distribution of crack cocaine; theres no question about that. The indictment however, does not make any allegation under 18 U.S.C. section 2. The Court; Correct. This is acknowledged error by all three parties, my Attorney, Judge and US Attorneys.

Page 20; 7 (US Attorney's) So, I just want that to be clear to everybody in the room that thats not in the indictment, although the defendents admission certainly constitutes distribution, but that's not in the indictment.

So long as "EVERYONE IS CLEAR" on that, as we proceed, I want that to be on the record.

Also [illegible] Error was a charge of conspiracy as stated on Page 3; 24 and Page 4; 1-13, which was thrown out, but due to the nature of the 4.1 which is [illegible] surety, it also should have been thrown out.

As the U.S. Supreme Court has previously ruled "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond reasonable doubt. Apprendi at 690. In Blakely the Supreme Court rules over [illegible] dissents' that, the 'statutory maximum' (which in my case under USSG. § 2D1.1 (C) (8)) sentence a judge may impose "SOLELY" on the basis of the facts reflected in the jury verdict or admitted by the defendant. Blakely supra, at *4; in other words, the relevant 'statutory maximum' IS NOT the [illegible] findings" WHEN A JUDGE INFICTS PUNISHMENT that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

It is long standing precedent in all courts, that a Jury can ONLY return a verdict on the elements/factors that are explicitly cited in the indictment. For the verdict to be based on any element/factors more or [illegible] less is PLAIN CONSTRUCTIVE AMENDMENT to the indictment itself. "THIS" would (HAS) violate the DUE PROCESS CLAUSE of the Fifth Amendment along with the Fair Notice [illegible] of the indictment Clause. So a jury CAN NOT return a verdict based on elements/factors that are not explicitly cited in the indictment. Also, a defendant in a guilty plea Even IF ADMITTING elements/factors not in the indictment, "CAN NOT" and should not be found by the court/trier/fact-finder to have committed those acts and be punished for them.

The Blakely Court addressed just this type of issue in that guilty plea [illegible] the court held that "[illegible] rule - Agreed"

are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label as elements of the crime, and those it labels sentencing factors--no matter how much they may increase the punishment--may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it--or of making an illegal lane change while fleeing [illegible] on his own, without a jury finding. Not even Apprendi's critics would advocate this absurd result. Cf. 530 U.S., at 552-553 (O'Connor, J., dissenting)...

When the Sentencing Reform Act of 1984 was enacted as positive law, there was a provision for the U.S.S.G. [illegible] the commission. Also the pre-Sentencing Reform Act of the 1984 sentencing statute had to be repealed in order for the new statute to be enacted. Thus, a court cannot revert to a repealed statute on which to base a sentence.

[illegible] the issue of the quantity [illegible] the [illegible] under U.S.S.G § 2D1.1 (c)(8). United States v. Thomas, 274 F.3d 655 (2nd Cir. 2001). In that case it was held that drug quantity, under the statutory scheme of 21 U.S.C § 841 (b)(1) is an element of the offence which MUST be charged in the indictment and submitted to the jury for proof beyond a reasonable doubt.

The Second Circuit Court of Appeals solicited amicus briefs from the various public defenders offices within the circuit, as well as from the [illegible] Bar Association, National Association of Criminal Defense Lawyers, and Families Against Mandatory Minimums on the issue of whether the sentencing scheme of 841 was facially unconstitutional. However, for unknown reasons the court did not choose to address the issue. Instead the court limited its holding to (1) whether, under Apprendi, the drug type and/or quanity are elements of the offence, (2) whether plain error under rule 52(b), Fed. R. Crim. P, applied, and

(3) whether the error was a trial error, sentencing error, or a mixture of both trial and sentencing error.

The Thomas court held that to charge a defendant with violations of 21 U.S.C. § 841, without reference to drug type or quantity, the sentencing of a defendant to a sentence within §§ 841 (b)(1)(B) or (b)(1)(A) amounted to "Constructive Amendment" of the indictment which is per se error.

Also, the U.S. Court of Appeals for the fifth circuit previously held that an Apprendi error involving the failure to charge drug quantity in the indictment (which in my case, was not applicable to its purity) and submit it to the jury for proof beyond a reasonable doubt is a jurisdictional defect. See United States v. Gonzales, 258 F.3d 355, 360 (5th Cir. 2001). see also United States v. Baptiste, 267 F.3d 578, 593 (5th Cir. 2001).

Jurisdiction can be raised at any time, and addressed by federal courts at any time on their own motion. See McGrath v. Kristensen, 340 U.S. 162 (1950). Jurisdiction cannot be waived and cannot be conferred upon a federal district court by consent, inaction or stipulation. See California v. La Rue, 409 U.S. 109, 112, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972).

In both the Gonzales and Baptiste cases the government failed to charge drug quantity in the indictment (gross and net) or submit it to the jury for proof beyond a reasonable doubt. The court held that such a failure is jurisdictional in nature and therefore evidence adduced at trial supporting the drug quantity, or even stipulations as to drug quantity made by the defendant, are NOT Relevant to the analysis of a claim of such failure. In other words, the court cannot look to what drug amount, leadership role, monetary amount, etc. anything that amounts to an enhancement from the base offense level) was claimed to be proven involved by the government witnesses in reviewing a claim under Blakely/Apprendi. Nor can a court in a guilty plea use the defendant's admission as to drug quantity, monetary amounts, leadership role, etc. (anything that amounts to an enhancement from

the Base [illegible] Level) that is not [illegible] [illegible] [illegible].

In Conclusion to why my issues should be heard, the facts [illegible] of the 4.1 grams, if [illegible] or removed [illegible] would not [illegible] [illegible] also the fact that I [illegible] gun [illegible] Poss./w Intent to Distribute Cocaine [illegible] other acount under 21 U.S.C. 841 (a) the court [illegible] [illegible] [illegible] of faults.

I ask the court to please reconsider [illegible] into the [illegible] presented and [illegible] to investigate certain issues. The facts are very clear as to the amount of error made whether the court will acknowledge [illegible] wrong doing [illegible] themselves.

Relief Sought

The petitioner seeks for this court to order the reduction to his sentence below the [illegible] [illegible] [illegible] to vacate the [illegible] tion's conviction and remand his case to the District court for dismissal with no intent for the petitioner to seek damage [illegible].

Respectfully submitted

Anthony Avery 23351-038

[signature]

Federal Correctional [illegible] Gilmer

P.O. Box [illegible]

Glenville, WV 26351

I declare under the penalty of perjury that the information in this response is true and correct to the best of my knowledge as according to 28 U.S.C § 1746.

[signature]

Certificate of Service

I hereby declare that a copy of this Response To U.S. Attorney's Petition was mailed postage pre-paid to the following on This 24th day of 11th 2004

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